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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

PUBLIC COPY

FILE: [REDACTED] Office: DENVER, CO

Date: **AUG 25 2003**

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:

[REDACTED]

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

AUG2503_02H2212

DISCUSSION: The waiver application was denied by the District Director, Denver, Colorado, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who attempted to procure admission into the United States in 1995 by fraud or a willful misrepresentation of a material fact. The applicant was found excludable by an immigration judge in January 1995, pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), and section 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(7)(A)(i)(I). The applicant was subsequently deported from the United States (U.S.) and warned, in writing, that in addition to meeting general immigration visa requirements, any reentry within a year of his deportation required the express permission of the Attorney General (now the Secretary of Homeland Security, "Secretary"). The record indicates that the applicant reentered the U.S. illegally within a year of his deportation. The applicant married a U.S. citizen in 1999, and he is the beneficiary of an approved petition for alien relative. He seeks a waiver of inadmissibility in order to remain in the United States with his wife and child.

The district director found that the applicant was subject to the reinstatement of deportation order provision of section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5) and that he was thus statutorily ineligible for benefits or relief under the Act. The district director denied the applicant's waiver application accordingly without addressing his assertions of extreme hardship.

On appeal, counsel asserts that the Immigration and Naturalization Service ("Service", now the Bureau of Citizen and Immigration Services, "Bureau") erred in applying section 241(a)(5) to the applicant's case. Counsel asserts that the applicant's illegal reentry into the United States occurred prior to the April 1, 1997, enactment date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, ("IIRIRA"), Pub. L. No. 104-208, § 303(b)(3), 110 Stat. 3009, and that the IIRIRA enactment of section 241(a)(5) was meant to apply only prospectively. Counsel asserts further that the applicant is eligible for adjustment of his status pursuant to section 245(i) of the Act, 8 U.S.C. § 1255(i), and that section 245(i) postdates and supercedes the enactment of section 241(a)(5) of the Act. Note, however, that whether the applicant is eligible for adjustment of status is not before the AAO. What is before the AAO is an appeal from a decision denying his waiver application.

Section 241(a) states in pertinent part:

(5) Reinstatement of removal orders against aliens illegally reentering. - If the Attorney General [Secretary] finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

On appeal, counsel refers to the Ninth Circuit case, *Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001) to support the assertion that section 241(a)(5) should not be applied retroactively. The Ninth Circuit held in *Castro-Cortez* that section 241(a)(5) of the Act was not retroactive and did not apply to illegal reentries that occurred prior to its April 1, 1997 enactment. The AAO notes that the Sixth Circuit has reached a similar conclusion. *Bejjani v. INS*, 271 F.3d 670 (6th Cir. 2001). The Eighth Circuit, by contrast, has held that the reinstatement aspect of section 241(a)(5) applies to aliens who made illegal reentries before April 1, 1997, but that the part of section 241(a)(5) that precludes an alien who is subject to reinstatement from seeking relief from removal applies only to aliens who make illegal reentries on or after that date. *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858 (8th Cir. 2002).

None of these three cases binds the AAO in this case, since the applicant in the present case resides within the jurisdiction of the Tenth Circuit Court of Appeals. See 28 U.S.C. § 41. The Tenth Circuit has not ruled on the issue of section 241(a)(5)'s retroactivity. The applicant will therefore be bound by the AAO's determination regarding whether section 241(a)(5) applies retroactively to the applicant. The AAO will not follow *Castro-Cortez*, *Bejjani*, or *Alvarez-Portillo* outside of the Ninth, Sixth and Eighth Circuits, respectively.

In cases outside of these Circuits, the AAO will follow the judgment of the Fifth Circuit in *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292 (5th Cir. 2002). In that case, the Fifth Circuit held that section 241(a)(5) applies to illegal reentries made before April 1, 1997. Against the argument that an alien may have reentered illegally in "reliance" on the former reinstatement provision, the Fifth Circuit cited with approval the dissent in *Castro-Cortez*:

[section] 241(a)(5) "does not deal with any vested rights or settled expectations arising

out of the alien's wrongdoing. Nor does it impose any new duties or new liabilities."

290 F.3d at 302, citing *Castro-Cortez*, 239 F.3d at 1056 (Fernandez, Circuit Judge, dissenting).

In particular, an alien who reenters illegally after a prior removal is in a position quite distinct from the position of the aliens involved in *INS v. St. Cyr*, 533 U.S. 289 (2001). Those aliens did something they were legally entitled to do - plead guilty to a criminal charge - arguably in reliance on the availability of relief under former section 212(c) of the Act. This sort of reliance was the most critical factor in the Supreme Court's conclusion that the amendment and ultimate repeal of section 212(c) could not apply to them. *Id.* at 325. What the applicant did in this case was flatly illegal - he reentered the United States unlawfully after having already been once deported. INA § 276(a), 8 U.S.C. § 1326(a). As the Fifth Circuit judgment in *Ojeda-Terrazas* makes clear, he had no legitimate expectation that he could avoid the consequences of that unlawful act.

Even if the argument is that he married in reliance on the ability to adjust status, section 241(a)(5) of the Act notwithstanding, this argument must fail. The AAO notes that the Fourth Circuit has held that an alien who did not seek adjustment of status based on his marriage to a citizen until after section 241(a)(5) entered into force could not be said to have relied on the former reinstatement provision. *Velasquez-Gabriel v. Crocetti*, 263 F.3d 102 (4th Cir. 2001). In this case, the applicant did not even marry until after section 241(a)(5) entered into force.¹ The judgments in *St. Cyr*, *Castro-Cortez*, *Bejjani*, and *Alvarez-Portillo* also came after his marriage. Thus, a claim that he married in reliance on being relieved of the impact of section 241(a)(5) is not tenable.

The applicant in this case has failed to establish that he had a reasonable expectation that he could receive relief from deportation at the time of his illegal reentry into the U.S. or prior to April 1, 1997. The applicant did not marry a U.S. citizen until 1999, several years after the enactment of section 241(a)(5) of the Act. The applicant therefore had no reasonable expectation when he reentered the United States unlawfully that he would be able to obtain a waiver of his inadmissibility nor that he could seek any other benefit under pre-IIRIRA laws. Thus, as applied to the

¹ How the Fourth Circuit might decide a case in which the alien *did* marry and *did* seek adjustment before section 241(a)(5) entered into force remains an open question. Thus, until the Fourth Circuit holds otherwise, the AAO will follow *Ojeda-Terrazas* in the Fourth Circuit, as well as in all Circuits other than the Sixth, Eighth and Ninth.

applicant, section 241(a)(5) of the Act does not impose any new duties or new liabilities. The section will therefore be applied to him retroactively. For this reason, section 241(a)(5) requires the AAO to affirm the director's decision denying the applicant's waiver application.

Even if section 241(a)(5) did not mandate a denial in this case, whether to grant the waiver application is a matter entrusted to AAO discretion. INA § 212(i), 8 U.S.C. § 1182(i). The AAO notes that the fraudulent conduct that makes the applicant inadmissible under section 212(a)(6)(C) of the Act is itself a factor weighing against a favorable exercise of this discretion. *INS v. Yang*, 519 U.S. 26 (1997); *Matter of Cervantez-Gonzalez*, 22 I & N Dec. 560 (BIA 1999); *Matter of Tijam*, 22 I & N Dec. 408 (BIA 1998). He compounded this negative factor greatly by returning to the United States unlawfully. Also, waiving his inadmissibility under section 212(a)(6)(C) of the Act would not make him admissible. He is also inadmissible under section 212(a)(9)(A)(ii) of the Act. That he has a citizen wife and a child is a positive factor but the AAO concludes that this positive factor is not sufficient to overcome the negative factors in this case. Thus, even if section 241(a)(5) did not mandate affirmance of the director's decision denying the applicant's waiver application, the AAO would nevertheless affirm the decision on the ground that the applicant does not merit a favorable exercise of discretion.

Counsel also asserts that section 245(i) postdates and supercedes the enactment of section 241(a)(5) of the Act, and that the applicant is therefore eligible for adjustment of his status pursuant to section 245(i) of the Act. Section 245(i) of the Act allows an alien who is physically present in the U.S. without inspection, eligible for adjustment of status, has a visa available and files and pays the fees for adjustment of status prior to April 30, 2001, to seek adjustment to permanent resident status. Whether section 245(i) creates an exception to section 241(a)(5), however, is not properly before the AAO. As already noted, *supra* at 2, what is before the AAO is an appeal from a denial of a waiver application, not of an adjustment application.

The record in this case reflects that the applicant reentered the U.S. illegally after having been deported and that he is subject to section 241(a)(5) reinstatement of his deportation order. He is thus ineligible for a waiver of inadmissibility under section 212(i) of the Act. Accordingly, the applicant's appeal will be dismissed.

ORDER: The appeal is dismissed.